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Nos. 91-543, 91-558 and 91-563

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In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF ALLEGANY, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF CORTLAND, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the requirement under the Low Level Radioactive Waste Policy Act Amendments of 1985 that the State of New York, acting either alone or in cooperation with other States, provide disposal capacity for low-level radioactive waste generated within its borders is consistent with the Tenth Amendment and related constitutional principles of federalism.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 942 F.2d 114. The opinion of the district court (Pet. App. 18a-26a) is reported at 757 F. Supp. 10.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1991. The petitions for a writ of certiorari were filed on September 30, 1991 (No. 91-543) and October 3, 1991 (Nos. 91-558 and 91-563). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021i, creates incentives for States to comply with a federal requirement that States ensure the availability of adequate disposal capacity for certain classes of low-level radioactive waste (LLRW) generated within their borders.[2] The 1985 Act represents Congress's attempt,

[1] "Pet. App." refers to the appendix to the certiorari petition in No. 91-543. "C.A. App." refers to the joint appendix in the court of appeals.

[2] The 1985 Act and the relevant NRC regulations define LLRW as radioactive waste other than "high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in section 2014(e)(2) [of Title 42, which refers to uranium and thorium tailings and wastes])." 42 U.S.C. 2021b(9); see 10 C.F.R. 61.2. Generally, LLRW consists of radioactively contaminated materials from commercial reactors, hospitals, research institutions, and industrial sites.

Under the 1985 Act, States are responsible only for LLRW that falls within the 1983 definitions adopted by the Nuclear Regulatory Commission (NRC) for Class A, B and C wastes. See 42 U.S.C. 2021c(a)(1) (citing 10 C.F.R. 61.55 (1983), which classified LLRW based on types and concentrations of radionuclides). The 1985 Act makes the federal government responsible for LLRW with radioactivity levels in excess of the Class C concentration of isotopes and for most Class A, B, and C waste generated by the federal government. See 42 U.S.C. 2021c(b)(1).

devised in cooperation with the States, to reinvigorate the state-oriented approach to disposal of LLRW that had been established by the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, which Congress also had developed in cooperation with the States. The 1980 and 1985 Acts assigned the States primary responsibility for ensuring the availability of sufficient disposal capacity for LLRW generated within their borders. In exchange, they afforded States significant control over the location and operation of disposal facilities, including the authority, as members of multi-state compacts, to exclude out-of-compact waste from their LLRW disposal facilities.

In February 1990, the State of New York, together with its Counties of Cortland and Allegany, filed suit in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the 1985 Act violates the Tenth and Eleventh Amendments of the United States Constitution, as well as the Guaranty Clause of Article IV, Section 4. The district court rejected those challenges, Pet. App. 18a-26a, and the court of appeals affirmed, *id.* at 1a-17a.

1. Congress enacted the 1980 and 1985 Acts in response to interstate tensions over LLRW disposal that threatened to close off access to disposal facilities for LLRW generators in States that did not have such facilities. Closings of three commercial

LLRW disposal facilities during the 1970s left the Nation with only three operational facilities—one each in Nevada, South Carolina, and Washington. Following a series of packaging and transportation accidents in 1979, Nevada and Washington ordered temporary shutdowns at the facilities within their borders, and South Carolina ordered a 50% reduction in LLRW accepted by the facility subject to its regulatory control. H.R. Rep. No. 314, 99th Cong., 1st Sess. Pt. 2, at 17-18 (1985); H.R. Rep. No. 1382, 96th Cong., 2d Sess. Pt. 2, at 25 (1980); 126 Cong. Rec. 20,135-20,136 (1980) (remarks of Sen Thurmond); C.A. App. 236. In light of growing public opposition to continued LLRW shipments from other States,[3] all three States announced their intentions to implement permanent shutdowns. C.A. App. 308, 321; Pet. App. 6a.

In response to these developments, Congress initially considered a proposal to construct LLRW disposal sites on federal land.[4] However, Congress deferred action at the request of the three States that already had disposal sites. A task force headed by seven governors, working under the auspices of the National Governors' Association (NGA), proposed a "state solution" to the LLRW problem, which was then presented to Congress with the unanimous support of the NGA's members. National Governor's Ass'n, *Low Level Waste: A Program for Action* (Nov. 1980) (C.A. App. 232-263); see H. Brown, NGA Center for Policy Research, *Low-Level Waste Handbook* iii (1986).[5] The NGA recommended federal legislation that would assign the States primary responsibility for ensuring adequate capacity for LLRW disposal and allow States to meet that responsibility either on their own or in cooperation with other States as members of interstate compacts. C.A. App. 241-243; see Pet. App. 6a-7a. The NGA further recommended that Congress encourage compact formation by granting approved compacts a waiver of the Commerce Clause's prohibition against state-created restrictions on interstate waste shipments. C.A. App. 242; see *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

The 1980 Act incorporated the States' principal recommendations. It declared a federal policy that each State is "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and that LLRW can be managed "most safely and efficiently * * * on a regional basis." Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348. The 1980 Act also encouraged States to enter into regional compacts by authorizing approved compacts, beginning in 1986, to restrict their facilities "to the disposal of low-level radioactive waste generated within the region." § 4(a)(2)(B), 94 Stat. 3348. But Congress declined for the time being

[3] See, *e.g.*, *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 630-632 (9th Cir. 1982) (striking down, on Commerce Clause grounds, a Washington law, enacted by referendum, to exclude shipments of LLRW from other States), cert. denied, 461 U.S. 913 (1983).

[4] See *Low-Level Nuclear Waste Burial Grounds: Hearing Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. 2 (1979) (remarks of Rep. McCormack).

[5] Congress received similar recommendations from the National Conference of State Legislatures and the State Planning Council on Radioactive Waste Management. H.R. Rep. No. 314, *supra*, Pt. 2, at 18.

to enact proposals in pending bills to impose sanctions as incentives for States to create intrastate or intra-compact disposal capacity—*e.g.*, cancellation of NRC licenses in non-conforming States or a prohibition against interstate shipment of LLRW unless made pursuant to an interstate compact. The NGA recommended against such sanctions because it concluded that they were unnecessary at that time. See C.A. App. 243.

2. By 1985, it had become clear that the objectives of the 1980 Act would not be met. Although seven proposed compacts had been submitted to Congress for approval, only three (the ones formed around the three sited States) had operational disposal facilities. See H.R. Rep. No. 314, *supra*, Pt. 2, at 18. If Congress had approved those three compacts, generators in 31 States—including many hospitals and research institutions that had little on-site storage capacity—could have been left with no outlet for their wastes. *Id.* at 18, 57.[6] The Governors of the three sited States, when confronted with the indefinite continuation of what they regarded as an inequitable distribution of disposal burdens, once again threatened to shut off or severely limit access to the Nation's only three commercial LLRW disposal facilities. *Id.* at 18-19.[7] Fearing a "nationwide crisis" if the problem was not

[6] See also 131 Cong. Rec. 38,404 (1985) (remarks of Sen. Hart); *id.* at 38,421 (remarks of Sen. Mitchell).

[7] See also S. Rep. No. 199, 99th Cong., 1st Sess. 3-4 (1985); *Low-Level Radioactive Waste: Hearings on H.R. 862, H.R. 1046, H.R. 1083, H.R. 1267, H.R. 2062, H.R. 2635 and H.R. 2702 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 150, 161-162 (1985) (testimony of South Carolina Governor Richard W. Riley).

resolved, Congress revisited the 1980 Act to strengthen incentives for the creation of new disposal capacity. See S. Rep. No. 199, 99th Cong., 1st Sess. 4 (1985).

Representatives of sited and non-sited States reconvened, again under the auspices of the NGA, to develop a legislative proposal for resolving the crisis without sacrificing the States' determination to retain authority over the siting and operation of LLRW disposal facilities. This group played a key role in the formulation of H.R. 1083, which formed the basis for the 1985 Act. Pet. App. 7a.[8] The bill, according to Representative Udall, its lead sponsor, was "primarily a resolution of the conflicts between the States that do not have disposal capacity, and the three other States that have capacity." 131 Cong. Rec. 35,203 (1985). New York supported the effort to reinvigorate the "state solution": one of its officials—recognizing that New York was "highly likely to be a host State," in light of its size and waste volume—supported congressional efforts to resolve the impasse, including adoption of "specific and easily identifiable milestones" for States to meet, backed by "[a]ppropriate penalties * * * for failure to meet these milestones."[9] And Senator Moynihan of New York spe-

[8] See C.A. App. 310-311, 323-324; see also 131 Cong. Rec. 35,204 (1985) (remarks of Rep. Udall) ("H.R. 1083 represents the diligent negotiating undertaken by that group. The fundamentals of their settlement are embodied in the bill we are bringing to the floor today.").

[9] *Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083 and H.R. 1267 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 98, 198 (1985) (testimony of Charles Guinn, Deputy Commissioner for Policy & Planning, New York State Energy Office); see

cifically urged enactment of the legislation in its final form. See 131 Cong. Rec. 38,423 (1985).

The 1985 Act provides three types of incentives to encourage States to develop LLRW disposal facilities. First, the Act permits discrimination against LLRW imports, initially in the form of price discrimination by the original three sited States (or the compacts of which they are members), and later in the form of either price discrimination or outright bans by sited compacts.[10] These provisions renew and extend the 1980 Act's relaxation of Commerce Clause prohibitions against restrictions on interstate waste shipments.

Second, the 1985 Act provides for federal payments (from a fund financed by disposal surcharges) to States that meet a series of interim milestones toward ensuring adequate disposal capacity for LLRW gen-

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also *Low-Level Radioactive Waste Regional Compacts: Hearings on H.R. 1012, H.R. 3002 and H.R. 3777 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 264-267 (1983) (testimony of Eugene Gleason, Director of Policy Planning, New York State Energy Office) (expressing New York's support for allowing siting compacts to exclude out-of-state LLRW, provided that "interim access to existing facilities will be made available" to generators in non-complying States).

[10] Price discrimination by the three existing disposal facilities is subject to statutory limits until January 1, 1993. See 42 U.S.C. 2021e. Price discrimination and access restrictions by compact disposal facilities established after passage of the 1985 Act are limited only by the terms of the congressionally approved compacts. See 42 U.S.C. 2021d; see, *e.g.*, Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act of 1985, Pub. L. No. 99-240, Tit. II, § 221, Arts. IV(2) and V, 99 Stat. 1862-1863 (discrimination provisions of Northwest Interstate Compact).

erated within their borders by January 1, 1993. 42 U.S.C. 2021e(d)(1)-(2). New York has met the three milestones to date and has received its incentive payments.

Third, the Act contains an additional system of incentives to meet the milestones. Initially, LLRW generators in complying States are exempted from stiff disposal surcharges levied on their counterparts in non-complying States, 42 U.S.C. 2021e(e)(2)(A)(i) and (e)(2)(B)(i); later, those counterparts will lose ensured access to existing disposal facilities. 42 U.S.C. 2021e(a), (e)(2)(A)(ii) and (e)(2)(B)(ii). The States themselves then will be subject to direct incentives beginning in January 1996:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C).[11]

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[11] States are expected to ensure adequate intrastate or intra-compact disposal capacity by January 1, 1993, but non-complying States can avoid responsibility for LLRW generated within their borders until 1996 simply by forfeiting incentive payments. 42 U.S.C. 2021e(d)(2)(C).

This so-called "take-title" provision originated with the Senate Committee on Environment and Public Works.[12] It was added to H.R. 1083, the bill produced by the House Committee in collaboration with the States, out of concern that direct incentives were necessary for the States to meet their responsibilities, and thereby prevent a repetition of the 1980 Act's failure.[13] The take-title provision was viewed as imposing a risk on non-sited States (albeit one that every State could prevent from materializing), in return for important benefits, "chief of which is the right [as a member of an approved compact] to exclude low-level radioactive waste not generated in the compact region from any disposal facility located within the region." 131 Cong. Rec. 38,415 (1985) (remarks of Sen. Johnston).

Although the 1985 Act contains precise deadlines and clear incentives, it preserves wide discretion to the States in deciding how their LLRW programs should be structured and administered. In the first place, States choose whether to meet their responsi-

[12] See 131 Cong. Rec. 38,414 (1985) (remarks of Sen. Johnston).

[13] See 131 Cong. Rec. 38,405-38,406, 38,414-38,416 (1985) (remarks of Sens. Hart and Johnston). The take-title provision was incorporated in a package of amendments to H.R. 1083 that was approved by the Senate, *id.* at 38,425, adopted by the House with modifications not relevant here, *id.* at 38,120, and reaffirmed as modified by the Senate, *id.* at 38,558. A variant of the take-title provision appeared in an earlier version of the House bill. See *Low-Level Radioactive Waste Disposal: Joint Hearing on S. 1517 and S. 1578 Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Env't and Public Works*, 99th Cong., 1st Sess. 574-577 (1985).

bilities alone or through participation in a regional compact. 42 U.S.C. 2021c(a)(1). Furthermore, States in which disposal facilities are located may leave the licensing and regulation of the facilities to the federal government or perform those functions themselves, pursuant to authority conferred by the established "agreement states" program under the Atomic Energy Act.[14] Sited States also choose whether to undertake the siting, construction and management of any disposal facility directly, or instead to contract for performance of those tasks by private firms. See C.A. App. 161.[15]

3. In 1986, the New York Legislature, having determined that the State could no longer "assume that other states will continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York," enacted legislation providing for the siting and financing of a LLRW disposal facility in New York.[16] New York opted for direct state administra-

[14] See 42 U.S.C. 2021 (authorizing withdrawal of federal regulatory authority over certain nuclear materials in favor of regulatory programs run by qualified States). New York was one of the first States to assume this regulatory role under the Act. See Pet. 12 n.5; 27 Fed. Reg. 10,419 (1962); C.A. App. 184-186.

[15] The 1985 Act also affords States and compacts flexibility in selecting from among disposal methods. See 42 U.S.C. 2021g (directing NRC to publish technical guidance on alternatives to shallow land burial); C.A. App. 166 (affidavit describing guidance).

[16] See 1986 N.Y. Laws, ch. 673, § 2, codified at N.Y. Envtl. Conserv. Law §§ 29-0101 note (McKinney Supp. 1991). The Legislature found this action "necessary to provide for continued operation of essential and beneficial medical, research, industrial, energy and other facilities in New York which use

tion of its program to ensure adequate disposal capacity.[17] That decision was consistent with New York's long history of active involvement in the nuclear field, as a promoter and regulator of the nuclear industry and as a large-scale generator of LLRW through its operation of two state-run nuclear power plants. See Pet. 12 n.5, 14; Pet. App. 5a-6a; C.A. App. 217-218, 292, 295, 300-305. New York has also chosen to act independently rather than join a compact.[18] Funding for these efforts is presently derived from assessments on nuclear power plants and federal payments received by New York for meeting the milestones set forth in the 1985 Act.[19] The state legislation directs that "[p]ermanent disposal facilities shall be completed and begin operation no later than [January 1, 1993]." N.Y. Pub. Auth. Law § 1854-c.3 (McKinney Supp. 1991).

In 1988, New York developed a list of five potential sites, two in Cortland County and three in Allegany County. Pet. App. 8a. Residents of the two Counties have opposed consideration of those sites. C.A. App. 32-33, 42, 68-76.

4. a. Petitioners filed this suit in February 1990, seeking a declaratory judgment that the 1985 Act vio-

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radioactive materials and generate low-level radioactive waste and to protect the public health and welfare of the people of the state of New York." *Ibid.*; see C.A. App. 117, 123, 136, 139, 142, 145, 148 (references to loss of access for New York generators in recommendations favoring New York bill).

[17] See N.Y. Envtl. Conserv. Law §§ 29-0301 to 29-0305, 29-0501 to 29-0503 (McKinney Supp. 1991); N.Y. Pub. Auth. Law 1854-c.3 (McKinney Supp. 1991).

[18] See *Low-Level Waste Legislation Hearings*, note 9, *supra*, at 197 (testimony of Charles Guinn).

[19] N.Y. Pub. Auth. Law § 1854-d.2.c (McKinney Supp. 1991).

lates the Tenth and Eleventh Amendments, as well as the Guaranty Clause of Article IV, Section 4. The district court granted summary judgment in favor of the United States.[20] The district court first rejected the contention that the 1985 Act violates the Tenth Amendment, finding that the Act was not the product of any defect in the political process and that New York had not been unfairly singled out for especially harsh treatment. Pet. App. 24a-25a. The court also summarily rejected petitioners' Eleventh Amendment argument, holding that the Eleventh Amendment operates as a restriction on judicial, not congressional, power. Pet. App. 25a (citing *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989)). Finally, the court dismissed petitioners' claims under the Guaranty Clause, finding them "inextricably intertwined" with their unmeritorious Tenth and Eleventh Amendment claims. *Ibid.*

b. The court of appeals affirmed, sustaining the 1985 Act (including its take-title provision) against petitioners' various constitutional attacks. Pet. App. 10a-17a. First, the court found that the national legislative process had operated properly in producing the 1980 and 1985 Acts, and that those Acts in fact "promot[ed] state and federal comity in a fashion rarely seen in national politics." *Id.* at 13a. The court found it significant that the purpose of the 1980 and 1985 Acts was to furnish "identical treatment for all states." *Id.* at 15a. For this reason, the court concluded that the Acts satisfy the central concern of *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911), which was cited with approval in *Garcia* v. *San Antonio Metro-*

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[20] The States of Nevada, South Carolina and Washington intervened as defendants to protect their interest in the creation of new disposal capacity. Pet. App. 9a.

politan Transit Authority, 469 U.S. 528, 556 (1985) —namely, preservation of " 'equality in dignity and power' among the several states," Pet. App. 15a (quoting 221 U.S. at 568). The court also pointed out that the transfer of title to nuclear waste is not an uncommon regulatory measure in this field. Pet. App. 15a-16a.

The court of appeals similarly rejected arguments based on the Eleventh Amendment and the Guaranty Clause. It reasoned that the Eleventh Amendment is not an independent limitation on Congress's power to legislate under the Commerce Clause, and that Allegany County's Guaranty Clause argument was "analytically indistinct" from the Tenth Amendment arguments raised by the other petitioners. *Id.* at 16a-17a.[21]

ARGUMENT

The decision of the court of appeals is consistent with this Court's decisions, and it does not conflict with the decision of any other court of appeals. The 1985 Act represents neither a breakdown in the protection of state interests in the national political process nor an extraordinary intrusion on state sovereignty. To the contrary, the federal policy that petitioners now attack was devised, in close cooperation with the States, as a means of resolving a serious dispute among the States in a manner that satisfied the States' own demands for authority over the subject matter, which they regarded as one of pressing local concern. Moreover, the only other two courts to have considered the question have sustained the 1985

[21] Petitioners also raised a due process objection in the district court, but they did not renew it on appeal. Pet. App. 10a.

Act against federalism challenges.[22] Further review therefore is not warranted.

1. a. The most recent decision of this Court to discuss the constitutional delineation of federal and state power is *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991). There, the Court pointed out that *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and related rulings permit only limited review of Acts of Congress on federalism grounds. Indeed, the Court's recognition that current law "has left primarily to the political process the protection of the states against intrusive exercises of Congress' Commerce Clause power" formed part of the rationale for *Gregory*'s requirement that Congress provide a "plain statement" of its intent if it wishes to constrain States' "fundamental" decisions, such as those concerning qualifications of their judges. 111 S. Ct. at 2400, 2403. The 1980 and 1985 Acts of course contain the requisite plain statements of congressional intent that the States assume responsibility for LLRW generated within their borders—and, at the same time, that the States have broad latitude in selecting the appropriate means for doing so.

b. This case presents no occasion for a defiinitive exposition of the types of flaws or malfunctions in the national political process that the Court's recent decisions have suggested might provide a basis for invalidating congressional enactments under the

[22] See *Concerned Citizens* v. *United States Nuclear Regulatory Commission*, No. CV90-L-70 (D. Neb. Oct. 19, 1990), slip op. 8-9, appeal docketed, No. 91-2784 (8th Cir. Aug. 12, 1991); *Michigan* v. *United States*, 773 F. Supp. 997 (W.D. Mich. 1991), appeal docketed, No. 91-2281 (6th Cir. Nov. 19, 1991).

Commerce Clause power. See *Garcia*, 469 U.S. at 556. To the extent, for example, that *South Carolina* v. *Baker*, 485 U.S. 505 (1988), calls for a statute-specific review of the legislative process, no reasonable procedural standard would threaten the 1985 Act. Petitioners do not suggest that New York or any other State was singled out in a way that left it "politically isolated and powerless," *Baker*, 485 U.S. at 513, or that any State was "deprived of any right to participate in the national political process." *Ibid.* To the contrary, the statutory policy that each State is "responsible for providing for the availability of capacity * * * for the disposal of [LLRW] generated within its borders," 1980 Act § 4(a)(1)(A), 94 Stat. 3348, originated with and was unanimously endorsed by the States themselves. See pages 4-5, *supra*. They sought this responsibility, coupled with significant powers to restrict interstate commerce in LLRW, in order to resolve the dispute between sited and non-sited States in a manner that enhanced state authority over the siting and operation of LLRW disposal facilities. The 1985 Act, also enacted with active state participation, was intended to salvage that approach.

New York, moreover, is in a particularly poor position to claim that it was excluded or victimized, given its support for the general approach of the 1980 and 1985 Acts during the legislative process, including enunciation of clear milestones and imposition of appropriate penalties when they are not met (see page 7, *supra*), and the fact, conceded by the State (91-543 Pet. 7), that "New York State's congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." See pages 7-8, *supra*. For these reasons, it is difficult to

imagine a less suitable vehicle than this case for a further articulation of judicially enforceable principles governing federal-state relations.

c. Even when federalism challenges to congressional legislation were controlled by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court eschewed the kind of wooden approach reflected in petitioners' selective account of the 1985 Act. For example, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court expressly recognized that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission" even to federal enactments that regulate "'States as States,'" address indisputable "'attribute[s] of state sovereignty,'" and impair States' ability "'to structure integral operations in areas of traditional government functions.'" 452 U.S. at 287-288 & n.29 (citing *National League of Cities*, 426 U.S. at 845, 852, 854); see also *FERC* v. *Mississippi*, 456 U.S. 742, 764 n.28 (1982); *id.* at 778 n.4, 781 n.8 (O'Connor, J., dissenting). The dissenting opinion in *Garcia* expressed the same view, describing *National League of Cities* and its progeny as contemplating that an overriding federal interest might, in certain circumstances, outweigh the state interest in autonomy. 469 U.S. at 562-564 (Powell, J., dissenting); see also *id.* at 588 (O'Connor, J., dissenting).

In this case, petitioners do not dispute Congress's judgment that it was confronted with a "nationwide crisis" concerning the disposal of LLRW, S. Rep. No. 199, *supra*, at 4, and that the crisis had resulted specifically from a threatened exacerbation of barriers to interstate shipment of LLRW, the refusal by the States to accept responsibility for the LLRW

generated within their borders, and the continued willingness by most States to keep the burden of LLRW disposal on the three States that already had LLRW disposal facilities. See pages 3-6, *supra*. Petitioners likewise do not dispute that the States themselves—including New York—wished to assume responsibility for LLRW disposal and recommended that Congress enact legislation embodying that principle, while affording the States countervailing advantages and broad latitude in designing an LLRW disposal strategy. Finally, petitioners do not question that Congress properly may ascertain and act upon the existence of such a consensus among the States. In addition, the subject matter involved—furnishing a safe method for long-term disposal of radioactive wastes—is one that, by its nature, is impressed with a public interest that makes participation by state governments especially appropriate, since the States will have to respond to any long-term problems the waste may produce.

Accordingly, the federal interest underlying the 1980 and 1985 Acts embraced both the need to solve the interstate LLRW problem *and* the need to do so in a manner that respects state autonomy and the States' expressed interest in having regulatory authority. Thus, the "nature of the federal interest" advanced here (see *Virginia Surface Mining*, 452 U.S. at 288 n.29) fully justifies the policy of the 1980 and 1985 Acts that the States are responsible for disposal of LLRW waste. Compare *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting) (proper resolution of federalism claims "lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States").

The State of New York in fact *has* assumed responsibility for LLRW by enacting legislation that provides for the siting of an LLRW disposal facility within its borders, to be operated by the State itself. See pages 11-12, *supra*. It was particularly fitting for New York to take that step, because as the State acknowledges, "New York State has been active in the regulation of such materials within its borders for close to three decades as an agreement state in accordance with 42 U.S.C. 2021(b)" (91-543 Pet. 12 n.5); "the New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities" (*ibid.*); and "New York State has sought for three decades to encourage the responsible development of nuclear power within its borders and has pioneered experiments in nuclear waste management technology" (91-543 Pet. 14). Petitioners do not contend that there are any new factors that now would make it technologically infeasible or uniquely burdensome for New York to follow through with the commitment that the State Legislature made in 1986 to assume responsibility for LLRW disposal.[23]

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[23] The brief filed by amici State of Ohio, *et al.*, similarly represents (at 3, 6) that the "States generally are progressing with the development of disposal facilities," although it is anticipated that "not all States will be able to develop or to obtain access to a disposal facility by 1996." Thus, any obstacles other States might meet appear to be ones of timing, not substance. There is no reason to believe at this time, four years before the effective date of the take-title provision, that any State that might not have a permanent solution in place by January 1, 1996, would not be able to arrange at least an interim solution with another State (or compact) that has a disposal facility.

d. Contrary to the petitioners' contention (91-543 Pet. 14; 91-558 Pet. 8, 14; 91-563 Pet. 15-16, 21-22, 26-28), affirmative federal directives to the States are not necessarily inimical to the constitutional balance between federal and state sovereignty. Congress's power to require state courts to hear actions brought under federal law, provided that similar state-law actions are within their jurisdiction, is well established. See *Testa* v. *Katt*, 330 U.S. 386, 392-394 (1947); accord *FERC* v. *Mississippi*, 456 U.S. 742, 760-763 (1982). To be sure, these types of commands to state courts may, as a general matter, threaten state sovereignty less than commands addressed to state executive officials and legislatures. See *FERC*, 456 U.S. at 762; *id.* at 784-785 (O'Connor, J., dissenting). But it is clear that, in some circumstances at least, affirmative federal directives may be addressed to other state officials as well.

For example, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court endorsed the development of federal-law principles to govern interstate conflicts over pollution from municipal sewer systems. *Id.* at 107-108 (federal district courts can effectuate their resolutions of such disputes under federal common law by imposing obligations on public agencies created by the States); accord, *New Jersey* v. *City of New York*, 283 U.S. 473 (1931). Similarly, in *Colorado* v. *New Mexico*, 459 U.S. 176 (1982), the Court observed that it had in the past "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Id.* at 185 (citing *Wyoming* v. *Colorado*, 259 U.S. 419 (1922)). And in *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940),

the court warned that Colorado could be held in contempt if its officials failed to meet their obligation under the prior decree to prevent excessive diversions by Colorado citizens.[24]

Even in the context of an Act of Congress rather than a judicial decree, this Court has made clear that pursuit of valid federal objectives may properly result in the imposition of burdens on the States. See *Baker*, 485 U.S. at 515. The responsibilities that devolve upon the States under the federal Acts are less burdensome, for instance, than the obligations imposed by the Fair Labor Standards Act, which required States to change their employment practices and devote significant additional revenue to employee salaries, see *Baker*, 485 U.S. at 515 & n.8 (discussing effects of *Garcia*), and cannot be significantly more burdensome than the bond registration requirements at issue in *Baker*, which required "state legislatures * * * to amend a substantial number of statutes * * * and * * * state officials * * * to devote substantial effort to determine how best to implement a registered bond system." *Id.* at 514.

The responsibilities that devolve upon the States under the federal Acts also are far less substantial than

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[24] Petitioner Cortland County argues (91-563 Pet. 18-27) that Congress should have addressed the recurring LLRW crisis without imposing unavoidable responsibilities on the States. But it fails to identify less intrusive alternatives that would have accomplished the same objectives. The most obvious alternative—federal preemption—was contrary to the recommendations of the States themselves; Congress abandoned proposals for federal siting and operation of LLRW disposal facilities after the States indicated that "the siting of a low-level nuclear waste facility involves primarily state and local issues which are best resolved at the governmental level closest to those affected." C.A. App. 236; see *id.* at 251.

the obligations specified in the Clean Air Act regulations that EPA retracted in 1977, after they were found to be inconsistent with the Act in three appellate decisions cited by petitioners (91-543 Pet. 16 n.6; 91-558 Pet. 11-13, 18; 91-563 Pet. 11-13, 33-41). See *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977).[25] In those cases, the EPA Administrator construed the Clean Air Act as authorizing him, in the event a State failed to submit an adequate air pollution control plan, to promulgate a detailed federal plan and compel States to implement it by enacting legislation and appropriating funds. Noting that the Administrator's interpretation of his statutory powers would raise serious constitutional questions, three courts of appeals declined to construe the Act as allowing EPA to compel state implementation of federal plans. See *Maryland* v. *EPA*, 530 F.2d at 228; *District of Columbia* v. *Train*, 521 F.2d at 983-987; *Brown* v. *EPA*, 521 F.2d at 832-837.

These appellate rulings were subsequently vacated by this Court after the Administrator conceded that certain revisions had to be made in the challenged regulations. 431 U.S. 99 (1977). Accordingly, con-

[25] See also *Arizona* v. *EPA*, 521 F.2d 825 (9th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Alaska* v. *EPA*, 521 F.2d 842 (9th Cir. 1975). But see *Pennsylvania* v. *EPA*, 500 F.2d 246, 260-263 (3d Cir. 1974) (upholding EPA regulations against statutory and constitutional challenges).

trary to petitioners' contention, they do not furnish any basis for a claim of a circuit conflict with the decision below. Moreover, in contrast to the EPA regulations, which would have required States to mobilize their own employees to implement detailed federal measures, the federal Acts afford States broad flexibility regarding the structure and administration of their own LLRW programs. It requires little more than that States ensure adequate intrastate or intra-compact capacity for LLRW generated within their borders, as the States had informed Congress they were prepared to do. States exercise wide discretion over technical and administrative means for achieving that end. See pages 10-11, *supra*. In a similar vein, the obligations imposed on the States by the EPA regulations, unlike those under the Acts at issue here, were not accompanied by provisions that significantly increased state control over interstate commerce in the interest of local autonomy. And, having been imposed by regulations rather than by explicit provisions of a federal statute, they could not have met the clear statement requirement of *Gregory* v. *Ashcroft*—which is satisfied here. Thus, the three EPA cases—which, in any event, predated *Garcia*, *Baker*, and *Gregory*—would not conflict with the decision below even if they had not been vacated by this Court.

e. In sum, petitioners greatly exaggerate the significance of the statutory declaration that States are responsible for disposal of LLRW generated within their borders. That provision cannot properly be viewed in isolation. We may assume that constitutional principles of federalism would prohibit the imposition of affirmative obligations on the States in many circumstances. See *FERC*, 456 U.S. at 765-766.

But the overall structure of the 1985 Act is permissible—and, indeed, it resolved the interstate conflict between sited and non-sited States in a manner that comported with the States' own preference for a "state solution" to LLRW disposal. The flexibility that was reserved to the States by this solution affirmatively advanced the very values of governmental responsiveness, democratic participation, and local innovation that underlie the constitutional structure of dual sovereignty (see *Gregory* v. *Ashcroft*, 111 S. Ct. at 2399)—and that petitioners invoke in this case.

2. At bottom, the congressional declaration in the 1980 Act that each State is responsible for disposal of LLRW generated within the State is a statutory recognition of the broad police powers of the States—and of the corresponding obligations that necessarily ensue as a practical matter—concerning protection of the public health and safety within their borders. It is difficult to see how such a declaration, standing alone, offends state autonomy. Moreover, the provisions of the 1980 and 1985 Acts by which Congress has initially sought to effectuate that policy—*e.g.*, those permitting conforming States to charge higher prices for, or to exclude, out-of-compact LLRW after the passage of statutory milestones—are routine examples of Congress's ability to offer inducements for the States to act. Cf. *South Dakota* v. *Dole*, 487 U.S. 203 (1987). They therefore raise no question under the Tenth Amendment or related principles of federalism.

Petitioners New York and Cortland County principally object, however, to the "take-title" provision of the 1985 Act, 42 U.S.C. 2021e(d)(2)(C). See 91-543 Pet. 6; 91-563 Pet. 8, 17. That provision requires each State or compact that fails to ensure disposal capacity for the LLRW generated within its borders to take title to such waste at the request of generators who are ready to ship it, and either to take possession of such waste or to compensate generators who involuntarily retain possession for any damages they incur. To be sure, this provision, if actually triggered in a particular instance in the future, might raise further federalism concerns. But petitioners fail to explain why it currently raises distinct concerns of such constitutional magnitude as to warrant this Court's attention here. The take-title provision—the only provision of the 1985 Act that can fairly be characterized as more "stick" than "carrot" for a State—does not become operative *until 1996*. Although the United States has not argued that petitioners' challenge is therefore unripe, the speculative nature of the harms ascribed to the take-title provision weighs heavily against further review at this time to consider the constitutionality of that specific provision.

That is especially so since its does not appear that the take-title provision was the inducement for the New York Legislature to enact the 1986 law that provides for establishment of an LLRW facility in the State, and there is no indication that the Legislature would repeal the 1986 law if the take-title provision were stricken from the federal Act. In fact, the introductory section of the law enacted by the New York Legislature in 1986 makes no mention of the take-title provision; it instead recites that the 1986 law was enacted because of the provisions of the federal Acts that would permit other States to exclude LLRW generated in New York, which could, in turn, impair the continued operation of essential and beneficial medical, research, industrial, energy, and other

facilities in the State. See pages 11-12 and note 16, *supra*. Nor have petitioners shown that New York State will be unable to meet the January 1996 deadline, after which a generator in New York might trigger the take-title provision,[26] or that, if triggered, the provision would have an effect for more than a brief period of transition until the State had completed its provisions for LLRW disposal.

In any event, the take-title provision of the 1985 Act merely adjusts rights and responsibilities between LLRW generators and the States in which they operate, in the context of a pervasively regulated field that is impressed with a strong public interest of both statewide and nationwide scope and importance. Moreover, it is unclear whether the provision operates independently to create a federal cause of action for damages (assuming, of course, that an occasion for liability would ever arise), rather than stating a general principle of liability or identifying the owner for purposes of state liability schemes, if any. At this stage, considerably before the take-title provision has gone into effect, there has been no opportunity for courts to provide definitive guidance on this point.[27]

[26] To the contrary, New York informed the court of appeals that it was "currently in full compliance with the 1985 Act" and that it had certified in 1989 that it would "be able to store, manage or dispose of its LLRW after January 1, 1993." N.Y. C.A. Reply Br. 10 & n.8.

[27] In a similar vein, petitioner Cortland County suggests that generators could use the take-title provision to compel States to take physical possession. See 91-563 Pet. 16-17. The language of the provision, however, is plainly susceptible of a narrower interpretation, under which non-complying States and compacts may refuse possession but become liable for damages if they do so. See 91-558 Pet. 4-5 (Allegany County's adoption of this narrower reading). Cortland County's expansive reading of the take-title provision has never been endorsed by the NRC. Moreover, to the extent such an interpretation would raise serious federalism concerns, the plain statement rule of *Gregory* v. *Ashcroft* may be implicated. See 111 S. Ct. at 2400, 2403.

In addition, even if the take-title provision were to be construed to contemplate a federal cause of action for damages, creation of such liability as a corollary to federal regulation is quite different from the direct imposition of federal commands and sanctions at issue, for example, in the EPA cases discussed above.

For the foregoing reasons, the speculative possibility that the 1985 Act's take-title provision might be triggered by a generator in New York after January 1, 1996, does not present an occasion for review here.

3. Petitioner Allegany County renews its argument (91-558 Pet. 15-18) that the 1985 Act violates the Constitution's provision that Congress shall guarantee to each State a republican form of government. U.S. Const. Art. IV, § 4. To the extent Allegany County merely relies on the Guaranty Clause as part of the source material for the constitutional principles of federalism, its argument requires no independent response, as the court of appeals correctly observed. Pet. App. 17a. But to the extent the County invokes the Clause as a distinct limitation on Congress's Commerce Clause power that is not reflected in the Tenth Amendment case law, the argument is foreclosed. It is well established that Guaranty Clause claims are not justiciable, whether raised against the States, *Baker* v. *Carr*, 369 U.S. 186, 223-224 (1962), or against the federal government, *id.* at 224-226; *City of Rome* v. *United States*, 446 U.S. 156, 182 n.17 (1980).[28]

[28] Even if Guaranty Clause claims were otherwise justiciable, it is doubtful whether the particular claim at issue here

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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could be presented against the United States by a political subdivision of the State where, as in this case, the State itself has declined to press the claim on behalf of its citizens. Cf. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923).

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